BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK RALEIGH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,074
CHECKERS FOODS	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 8, 2008 preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits in the form of temporary total disability payments and medical treatment after the ALJ determined that claimant had suffered an injury which arose out of and in the course of his employment with respondent and timely notice of that accident was provided.

Claimant appeared by his attorney, James A. Cline of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, William W. Richerson of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held May 8, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent?

2. Did claimant provide respondent with timely notice of accident?

Respondent contends the accident, as described by claimant, did not occur and, further, that claimant failed to advise any of his supervisors of the incident with 20-pound bags of potatoes. Claimant testified that he told the owners and his immediate supervisor of the incident and came to work with a sling on his right arm as well.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a 12-year veteran employee of respondent's store, alleges that on September 19, 2007, while moving 20-pound bags of potatoes, he injured his right shoulder. Claimant testified that he heard and felt a pop, and he experienced arm pain. Claimant did not tell his supervisor or the owners of the store of the incident that day. Instead, he sought medical treatment at the Via-Christi St. Joseph Campus (Via Christi) that night, where he was given an injection and taken off work for a few days. X-rays were taken, but were read as showing only mild degenerative joint disease.

Claimant testified that he returned to work approximately 3 days later and advised Clint Davidson and Mike Collins, the co-owners of the store, of the injury and the incident with the potatoes. Both Mr. Collins and Mr. Davidson testified that, while they were aware claimant had suffered an injury to his shoulder, claimant consistently stated that he did not know how he had injured the shoulder. Claimant testified that he also told Dennis Hess, respondent's produce manager and claimant's immediate supervisor, of the injury and how it happened. Mr. Hess also testified in this matter, denying being told by claimant of any injury suffered while claimant was moving potatoes. Claimant acknowledges that he did not request medical treatment from respondent when he first told them of the injury. The first time any representative of respondent acknowledges being made aware of the allegation of a work-related injury was on October 12, 2007, when an incident report was created.

When claimant reported the incident to Mr. Collins, claimant was told that he had to claim a work-related injury or no workers compensation would be provided. Claimant had no health insurance at the time of this injury.

Claimant received treatment from several medical health care establishments. Emergency room records from September 19, 2007, indicate that claimant denied any injury, but note that he lifts at work. No injury involving sacks of potatoes was mentioned. Notes from the Good Samaritan Clinic indicate an onset of September 17, 2007, "not

trauma related".[1] A Via Christi Specialty Clinic note of September 27, 2007, indicates claimant denied any recent injury. The only injury discussed in that note was of a fall of approximately 1 year before involving a direct blow to the shoulder. The note states that "the patient reports no recent injury to his shoulder".[2]

The initial impression of the health care professionals was a shoulder strain. X-rays were inconclusive, except for mild degenerative joint disease. But later tests, including an MRI, showed a complete tear of the supraspinatus and infraspinatus tendons of the rotator cuff in the right shoulder. Claimant was examined by pain specialist George G. Fluter, M.D., on April 10, 2008. Claimant reported to Dr. Fluter that he experienced right shoulder pain while working for respondent in September of 2007 while reaching above the shoulder level with the right arm. Claimant also advised Dr. Fluter of the injury with the 20-pound bag of potatoes. Dr. Fluter, after reviewing a multitude of medical records, determined that claimant's right shoulder injury arose from the potato incident with respondent. He stated in his report that there was a causal/contributory relationship between claimant's current condition and the reported injury of September 19, 2007. This is the only causation opinion in this record at this time.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

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[1] P.H. Trans., Resp. Ex. 1.

[2] P.H. Trans., Resp. Ex. 1.

[3] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2007 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[8]

This record is confusing with regard to claimant's allegation of a work-related injury connected with his handling of potatoes. Several medical records created contemporaneous with claimant's alleged injury fail to mention the potato incident, but the fact that claimant does lifting at work is mentioned in the emergency room record of the night of the injury. Additionally, claimant failed to tell his employer of the potato incident after coming to work with a 5-pound work restriction and wearing a sling on his right arm.

However, all four witnesses in this matter testified in front of the ALJ at the preliminary hearing. Thus, the ALJ had the opportunity to assess the credibility of each. In awarding benefits to claimant, the ALJ must have determined claimant's testimony to be the most credible. This Board Member finds, by the barest of margins, that claimant has proven an injury which arose out of and in the course of his employment with respondent.

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[9]

Claimant advised respondent of an ongoing problem within 3 days of the potato incident. While understanding that this contact is disputed, and any allegation of a work-related connection with this arm problem is also vigorously disputed, nevertheless, this Board Member finds, for preliminary hearing purposes, that notice of an accident was given within 10 days. Therefore, the award of preliminary benefits by the ALJ should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury on September 19, 2007, which arose out of and in the course of his employment with respondent, and that he gave timely notice of that accident.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated May 8, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[9] K.S.A. 44-520.

[10] K.S.A. 44-534a.

Dated this ____ day of August, 2008.

HONORABLE GARY M. KORTE

c: James A. Cline, Attorney for Claimant
William W. Richerson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge